

COMPLIANCE BOARD OPINION NO. 02-7
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June 18, 2002

Ms. Jane Ball Shipley

The Open Meetings Compliance Board has considered your complaint that the Board of Directors of the Enoch Pratt Free Library violated the Open Meetings Act in connection with a closed meeting on September 10, 2001. The complaint alleges that the closing of portions of the meeting was improper; that the Board of Directors improperly permitted certain “members of the public” to attend the closed meeting; and that the Board failed to include a required summary about the September 10 closed meeting in the minutes of its next open meeting. For the reasons set forth below, the Compliance Board finds that the holding of a closed session on the topics discussed by the Board of Directors did not violate the Act. Moreover, the Board did not violate the Act by allowing the attendance at the closed meeting of individuals who, although not members of the Board of Directors, bore a special relationship to the Directors distinct from that of members of the public generally. Finally, we find that the Board of Directors violated the Act by failing to include the requisite information about the September 10 closed meeting in the minutes of its next open meeting.

I

Complaint and Response

Because this matter involved six separate pieces of correspondence,¹ we shall set forth the various elements of the complaint separately, together with the Library’s response to each.

¹ Your original complaint was dated February 14, 2002. You supplemented the complaint with two other letters, dated March 25 and May 2, 2002. Marta D. Harting, Esquire, Counsel for the Library, submitted a timely initial response on March 18 and timely supplemental responses on April 29 and May 23, 2002. The unusual volume of correspondence associated with this complaint accounts for the Compliance Board’s inability to issue an opinion within the time period ordinarily expected under the Act. *See* §10-502.5(d)(2) of the State Government Article.

A. Basis for Closed Session

The complaint points out, and the Library's response confirms, that the September 10 meeting was closed for the Board of Directors to obtain legal advice from its counsel and to consult with counsel regarding pending litigation. The specific reasons for closing were identified as follows in the Directors' written statement prior to closing:

1. To consult with counsel to obtain legal advice regarding July 17, 2001 letter from Assistant Attorney General Richard E. Israel.
2. To consult with counsel to obtain legal advice regarding June 21, 2001 opinion from State of Maryland Open Meetings Compliance Board.
3. To consult with counsel to obtain legal advice regarding pending litigation in the Circuit Court for Baltimore City *A.C.O.R.N., et al., v. Board of Trustees of the Enoch Pratt Free Library of Baltimore City* (Case Number: 24-C-01-004254).
4. To consult with counsel to obtain legal advice regarding compliance with the Open Meetings Act.

The complaint contends that the Board of Directors had no basis for a closed session on items one and three, because the Board of Trustees, not the Board of Directors, was the subject of Mr. Israel's letter and is the defendant in the litigation. Moreover, it is contended, the presence of non-Directors (see Part IB below) vitiated any claim of attorney-client privilege. Finally, with respect to the fourth item, the complaint contends that such an educational and training session involves general information that is not protected by attorney-client privilege. As the complaint puts it, "Is it not totally incongruous for a public body to discuss the application and scope of the Open Meetings Act in closed session? Surely public bodies cannot use the fact that they have chosen an attorney to lead such a discussion as an excuse to exclude the public." The Library's response is that the Board of Directors had an interest in all four topics sufficient to warrant obtaining advice from its counsel and that the attorney-client privilege with respect to this advice was not waived.

B. Presence of Persons Not Members of the Board of Directors

The complaint alleges that Ms. Virginia Adams, a member of the Library's Board of Trustees but not the Board of Directors, "participated in the closed session. By admitting this member of the public to its meeting, while forbidding the attendance of other members of the public who were present, the Board of Directors did not hold a closed meeting, it held a partially closed meeting The Open Meetings Act does not permit boards to pick and choose which members of the public to exclude and which to admit." In addition, the complaint alleges that a Mr. John Patinella, who had been named to the Board of Directors, was not a legal member of the Board in September, 2001. Consequently, as a mere member of the public, Mr. Patinella "should not have attended a meeting of the Board of Directors that was closed to members of the public." Finally, the complaint notes the presence of Library employees at the meeting and suggests that their presence, together with that of Ms. Adams and Mr. Patinella, resulted in a loss of the attorney-client privilege, and therefore of the Board's ability to cite the Act's exception for consultation with its counsel.

The Library asserts that, because the Board of Directors is an agent of the Board of Trustees, the presence of a member of the Board of Trustees at a Board of Directors meeting is permissible and does not result in a waiver of attorney-client privilege. The Library's position is the same about the presence of members of the Library staff at the Board of Directors meeting. Finally, with respect to Mr. Patinella, the Library responds that he had been duly nominated as a Director at the time of the September 10 meeting. "Although the Board of Trustees did not take final action on the appointment until ... October, 2001, Mr. Patinella was, at a minimum, a de facto Board member pending final approval of his appointment."

C. Statement in Minutes

The complaint alleges that the minutes of the next open meeting of the Board of Directors, held on October 17, 2001, do not contain a summary of key information about the closed September 10 meeting. The Library's response is that the statement prepared at the time of the September 10 meeting contains all of the information required to be summarized in the next open meeting minutes. "Rather than regurgitate the information from its closing statement into the minutes of its next open session, the Board of Directors decided to utilize the closing statement from the September, 2001 meeting and make it available for public inspection upon request in the same location ... as its minutes." This action, it is argued, satisfies the requirements of the Act.

II

Analysis

A. *Basis for Closed Session*

The Open Meetings Act allows a public body to meet in closed session to “consult with counsel to obtain legal advice.” §10-508(a)(7) of the State Government Article. This exception requires that the public body’s lawyer be present at the meeting. *See, e.g.,* Compliance Board Opinion 95-2 (June 20, 1995), *reprinted in I Official Opinions of the Maryland Open Meetings Compliance Board* 113. The discussion must be limited to the rendering of legal advice - that is, questions, comments, and the imparting of information from members of the public body or staff members linked to the lawyer is advice-giving. Discussion that transcends the interchange related to legal advice is prohibited in a session closed on this basis. *See, e.g.,* Compliance Board Opinion 95-11 (December 18, 1995) *reprinted in I Official Opinions of the Maryland Open Meetings Compliance Board* 145.

The Act, however, neither explicitly nor implicitly restricts the scope of topics on which a public body might seek legal advice. For example, a public body may seek legal advice about the implications of a court decision in a case to which it was not a party if the decision potentially affects the public business for which the body is responsible. Thus, in this case, it is immaterial whether the Board of Directors is the direct subject of an Assistant Attorney General’s letter or a party to litigation affecting the Library. Given the Directors’ managerial responsibilities, surely the content of the letter and the litigation have some bearing on the Directors’ responsibilities and, hence, are appropriately the subject of legal advice from the Directors’ counsel.

Furthermore, the exception is available even if the subject matter of the advice is the Open Meetings Act itself. To be sure, counsel’s imparting of mere general information about the Act may be a highly attenuated form of legal advice. It would be reasonable to anticipate, however, that the Board of Directors would make training on the Act more pertinent by asking specific questions from their own experience. On these questions, private legal advice is entirely appropriate.²

² Of course, general education sessions about the Act offered by the Attorney General’s Office, when there is no attorney-client relationship between the lawyer presenting the information and the audience, is not covered by this exception.

Moreover, invoking the “legal advice” exception in §10-508(a)(3) does not depend on technicalities of attorney-client privilege and its waiver. On September 10, the Board of Directors sought legal advice from its counsel on a number of matters for which advice was appropriate. Presumably, it did so with the reasonable expectation that the advice would be privileged, because such interchanges normally are. From the Directors’ perspective at the time – and, indeed, from their perspective now, as argued by Ms. Harting – the presence of a member of the Board of Trustees, a new nominee to the Board of Directors, and certain Library staff members did not constitute the kind of public disclosure of legal advice that would result in waiver of the privilege.

The Compliance Board claims no expertise in the law of attorney-client privilege or the circumstances under which a third party’s presence might result in loss of the privilege. Even if we had such expertise, our jurisdiction to make a determination of this kind would be doubtful. It suffices for us to conclude that a public body may invoke the “legal advice” exception, even if persons are present in the meeting room other than the members of the body and their counsel, so long as the public body has a reasonable basis to believe that those in the room are under a legal, ethical, or fiduciary obligation to maintain the confidentiality of the proceedings. The Board of Directors had a reasonable basis for so concluding regarding those in attendance at the September 10 meeting.

B. Presence of Persons Not Members of the Board of Directors

Apart from the issue of whether their presence vitiated the Directors’ ability to invoke the “legal advice” exception, the complaint alleges that the presence of two “members of the public” (Ms. Adams and Mr. Patinella) resulted in an unlawful “partially closed” meeting.

Under the Act, a meeting is either open or closed. There is no hybrid. We have said that, in the case of an open meeting, a public body may not exclude members of the press or other subgroups of the general public. Compliance Board Opinion 99-11, August 12, 1999), *reprinted in II Official Opinions of the Maryland Open Meetings Compliance Board* 67. An open meeting means a meeting open to all on equal terms.

The converse is largely true of closed meetings. If a public body closes a meeting, it may not arbitrarily admit some members of the public but not others. Yet, as we have also said, a public body is free to admit to a closed session those staff members or outside consultants who may have needed information or otherwise may

help the public body conduct business. *See* Compliance Board Opinion 92-1 (October 15, 1992), *reprinted in* 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 1. The public body must have a reasonable basis for its decision to admit someone to a closed session who is neither a member nor support personnel.

On the face of it, it is not unreasonable for the Board of Directors to admit to a closed session a member of the parent body, the Board of Trustees, for which the Board of Directors serves as agent. It is also not unreasonable for the Directors to have admitted someone who had been nominated to membership, who was expected to be confirmed to that position within a month, and who therefore would need to become familiar with the issues before the Directors. The Compliance Board will not second-guess a public body's exercise of discretion in this regard unless it amounts to arbitrary favoritism shown toward selected members of the public. We do not think it accurate to characterize Ms. Adams or Mr. Patinella as mere "members of the public." Consequently, we find no violation of the Act in the Directors' decision to admit them to the closed session.

C. Statement in Minutes

Under §10-509(c)(2), whenever a public body meets in closed session, "the minutes for its next open session *shall include*" certain information about the closed session. This is mandatory language. Someone looking at the minutes should be able to see, within the confines of the minutes, the required information about the previous closed session. It is no answer to this requirement, as the Library would have it, that a separate document, the written statement prepared at the time of the closing of a session, is available for inspection.³ Consequently, we find that the Board of Directors violated the Act by failing to include in the minutes of its next open session the required summary of information about the September 10 closed session.

III

Conclusion

The Compliance Board finds that the Board of Directors of the Enoch Pratt Free Library did not violate the Act by closing the meeting of September 10, 2001 on the basis cited in its closing statement or by permitting certain persons who were

³ Moreover, the contents of the two are not identical. A written statement prepared *prior to* the closing of a meeting obviously cannot disclose "each action taken during the session" and probably would not accurately identify all "persons present" during the closed session. §10-509(c)(2)(iv).

not members of the Board of Directors to be present. The Board of Directors did violate the Act, however, by failing to comply with the Act's requirements for documentation in the minutes of the next open session of certain information about the September 10 closed session.

OPEN MEETINGS COMPLIANCE BOARD*

Courtney McKeldin

Tyler G. Webb

*Chairman Walter Sondheim, Jr. did not participate in the preparation or approval of this Opinion.